1966

Earl Bonner v. George W. Sudbury and Mrs. George W. Sudbury, His Wife, and Beth L. Davis, et al. : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

EARL BONNER,

Plaintiff-Appellant,

- vs. -

GEORGE W. SUDBURY and MRS. GEORGE W. SUDBURY, his wife, and BETH L. DAVIS, et al.,

Defendants-Respondents.

Case No.
10298

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County, Utah
Honorable Ray Van Cott, Jr., *Judge*

GALEN ROSS
731 East So. Temple
Salt Lake City, Utah
Attorney for Respondent

LELAND S. McCULLOUGH
304 East First South
Salt Lake City, Utah
Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

Authorities Cited

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STATEMENT OF THE KIND OF CASE

Plaintiffs brought action to quiet title to a right of way known as McClelland Street. More particularly, McClelland Street where it runs north from Sixth South Street at 1041 East (See Appendix "A"). A second cause of action was in trespass. Defendants denied all allegations and alleged that the disputed area was a dedicated public street; further, as a separate defense, that the defendants had an easement on the disputed parcel of land.

DISPOSITION IN LOWER COURT

After all side issues had been resolved at the pre-trial conference, the case went to trial June 9, 1964. On November 2, 1964, the court found for the defendants, no cause of action, the property having been dedicated by use as a public street (R-35). After a new trial motion was denied (R-41) this appeal was taken (R-44).

RELIEF SOUGHT ON APPEAL AFFIRMANCE OF THE DECISION OF THE LOWER COURT

STATEMENT OF FACTS

Appellant neglected to extract the facts in the manner most favorable to the prevailing party below. Respondent's facts will rectify this situation.

It was proved at trial that fee title was vested in Plaintiff-Appellant. Both parties called witnesses who testified for and against the proposition that the public and more particularly the Defendants had used the land in the past. Defendant introduced old city maps and index cards which showed the area to be public street. Further Defendant showed that the city paved the street and posted it as public with a sign.

Defendant, Mr. Sudbury, testified that he had built a garage on his property, after checking with the city attorney and being assured the street was public. He would have had to have used the first part of the right of way to gain access to his garage. He further testified that he had used McClelland Street for delivering coal to his house when he had a coal furnace, 1940-46; oil when he had on oil furnace, 1946-48 (R-62); to deliver groceries to his back door four times a month since 1941 (R-63); also for transporting building materials; and that the disputed area had always been used by him each week when he carried out his garbage. Further that he parked his car in back of his house and had to use the right of way to get it there. This was over a five year period from 1955 to 1960-62 (R-119). He testified that Defendant Davis had also used the street and that the general public and more particularly children used McClelland Street all the time (R-122).

Mr. Sudbury's testimony was corroborated by Sarah McKinney, a resident of the disputed right of way, who for the past 18 years had seen children using the right of way for going to school, music lessons, etc. She related having seen people drive up McClelland Street looking for addresses, believing it to be a through street (R-111). She further testified as to the use Mr. Sudbury had made of McClelland Street, verifying that he parked his car in back at least one time per month over the past 17 years (R-17).

Mr. Sudbury's testimony was also substantiated by Mr. Guy Kidder who lives on the south side of Sixth South across from the entrance to McClelland Street. His testimony was that he had seen the general public and particularly children, milk trucks, delivery trucks, etc., use the street (R-134).

The Plaintiff's witnesses attempted to refute the public's use of the street. Mr. Bonner stated he had seen Mr. Sudbury park his car in the back only once and unpack groceries there only once, (R-91), but he admitted that he worked during the day and only could have seen these instances on his day off (R. 144). Mr. Bonner stated that he had tried to place "spite" poles in the area but they were removed (R-63). Further he once placed a sign in front stating "Private Drive," but it also was removed.

Mrs. Bonner tried to substantiate her husband's testimony but admitted that people came on the street thinking it was a through street (R-71). Further that people had been on the street looking for various addresses (R-75).

Plaintiff's witness Duaine Davis admitted that deliveries were made on the street, and that his mail was delivered there during the time he lived there, 1941 to (R-80).

Vera Matthews testified that although she worked and wasn't home much of the time, she had seen delivery boys and paper boys use the street, and also occasionally had seen Mr. Sudbury and Beth Davis, the defendants, use it (R-83).

Plaintiff's witness, Helen Hunt, a McClelland Street resident, admitted on cross-examination that for the last 21 years she had seen milkman, postmen, and servicemen use the street, but not the general public (R-93).

Plaintiff's witness Larsen testified that he had seen children use the street on their way to and from Judge Memorial School, but in eight years had only seen Mr. Sudbury use it once and another adult use it only once (R-94).

Plaintiff's witness, Shirley Seeholzer, a McClelland Street resident, admitted to deliveries being made on the street and the defendant's use of it occasionally (R-98).

Plaintiffs also called Emmeline Cook, who testified as to use prior to sixty years ago (R-88), and Claud Wells, who never paid any attention to anything (R-97).

Apart from witnesses testifying as to use, the defendants produced evidence derived from documents and maps. Further, evidence derived from old tax records, and also evidence of Salt Lake City asphalting the street, and posting it with a sign.

Mr. Kenneth Yates, a city engineer, identified S... Lake City Survey Plats of the area in dispute dated 19... showing that at the time McClelland Street at Six... South was a public street (R-137). Further that nothi... had happened since 1915 to show that it was not still... public street. Mr. Yates further identified an index car... (Exhibit 12) which was dated 1930 and which indexe... the disputed area as McClelland Street and in parenthe... sis that it was public (R-140).

The defendants called Mrs. Bernessen Reynolds wh... introduced Exhibit 13, (County Assessors Plat Cards)... which showed that for at least the past twenty-five t... thirty years no one had paid property taxes on the dis... puted area (R-129). Under cross examination, Mr. Bon... ner had already admitted that he had not paid taxes... on the land (R-67).

Defendants called Mr. Paul Bay, a Salt Lake City... Traffic Engineer, who identified the street sign located... on Sixth South and McClelland Street. He testified that... it was the city's policy to place such signs only on public... streets (R-48). Under cross examination it was admitted... by Mr. Bonner that the city had asphalted the disputed... area (R-68).

ARGUMENT

POINT I.

THE UNDISPUTED EVIDENCE PROVES THAT FEE TITLE TO THE RIGHT OF WAY IS IN THE PLAINTIFF.

Respondent has no argument here, nor was any made at the trial. It was and is still Respondent's position that McClelland Street has been dedicated for at least one-half a century as a public street.

POINT II.

THE UNDISPUTED EVIDENCE PROVES THAT THE DEFENDANTS HAD NO RIGHT EITHER BY PRESCRIPTION OR BY DEED OF GRANT OR EASEMENT TO THE PROPERTY DESCRIBED IN POINT I.

Respondent will not direct argument to this point because the findings of fact and conclusions of law and the judgment of the trial court do not mention any easement interest of the defendants except as they are part of the general public. The trial court felt that the street had been dedicated as a public street. Hence, the only issue this court need to address itself to is whether or not the trial judge was correct in finding the disputed area to be so dedicated, which brings us to:

POINT III.

THE COURT DID NOT ERR IN HOLDING THAT THE RIGHT OF WAY IN QUESTION HAD BEEN DEDICATED FOR PUBLIC USE PURSUANT TO THE PROVISIONS OF 27-12-89, UTAH CODE ANNOTATED.

The Utah Code, Chapter 27-12-89, provides:

> "A Utah highway shall be deemed to have been dedicated . . . to the use of the public when it has been continually used as a public thoroughfare for a period of ten years."

It is submitted that the trial judge was correct in his findings. He based his decisions not only on oral evidence, but also on real evidence that stands out above the slanting, unclear, recollections and self-serving, conflicting observations of witnesses.

Plaintiff's witnesses, while admitting some public use, deny general public use. Defendant's witnesses testify to general public use. The trial judge could decide which witnesses to rely on and which to overlook. He, seeing their ulterior motives, was best able to arrive at a just decision, which should not be disturbed unless manifestly incorrect. *Schettler v. Lynch*, 23 Utah 305, 64 P. 955.

The Schettler case was quoted by Plaintiff to support the proposition that the owner's acts and intentions must be manifested expressly and openly, leading the public to be induced to believe the owner intended to dedicate the right of way as public. However, it more easily supports Respondent's position. The Schettler case held there was a public declaration, and then went on to say:

> "It is true, there is some conflict in the evidence relating to the dedication by the owner of the land and the acceptance by the public, and the findings of fact hereinabove referred to are thus based upon conflicting evidence, but there appears to be a decided preponderance of proof in support of them, and therefore this court will not disturb them. Likewise as to the other findings, and the conclusions of law of which the appellants complain. In such a case the findings of the trial court will not be disturbed unless they are so manifestly erroneous as to demonstrate some oversight or mistake."

Shettler v. Lyon involved an owner who allowed the city to pave the street and place a street sign thereon, and even allowed neighbors to commence construction of garages. These aspects the court held show an implied dedication estopping the owner from now objecting to the public use. The street paving, sign and allowing neighbors to start construction on their garages are analagous with this case with the exception that garage construction in the present case was completed.

In this case certain real evidence breaks through the gap between conflicting witness testimony. This real evidence introduced by defendants was:

1. Old Salt Lake City Survey Plat map (dated 1915)

2. Old Salt Lake City Indexing Cards (dated 1930)

3. Old County Assessor's tax records (25-30 years old)

The 1915 Plat map which "is admissible in evidence to prove the location of a boundry line" (See Amer. Jur. Vol. 20, Evidence 982) and the 1930 Salt Lake Surveyor Index Card which was "admissible to prove the facts stated therein," (Supra, 984) show McClelland Street to be public. Nor from 1915 to the present has anything been done to change the street's status. On the contrary the city asphalted the street and erected a monument to this prior dedication as a public street.

Salt Lake County, also, with records twenty-five to thirty years past, acknowledge McClelland Street's public status by decreeing that no private citizen need pay taxes on the area. What better proof that the street is public domain than every citizen is assessed part of its maintenance.

The trial court, after considering these records and maps; the law and equities of the case; and seeing the witnesses as they testified is best prepared to decide which witnesse's testimony should be given weight and which should be given little weight.

The quote of Appellant in *Morris v. Blunt,* 49 Utah 243, 161, P 1127 is quoted by appellant to show that the question of public dedication is one of analyzing the owner's manifested intent. Looking at the later part of Appellant's quote, we see:

> "It is true that a dedication by the owner, and an acceptance by the public once made the highway thus established continues to be a highway as long as the public use continues."

In the present case the dedication occurred, according to the official records before 1915 and has continued to date. The dedication has been acquiesced in over the years by allowing the city to pave the area, post a sign, and allowing the Federal Government o deliver mail directly to the houses on the street. One thinks the plaintiffs want their street public for the conveniences the city government can offer but they still desire to dictate who can come upon a public street.

The Appellant refuses in his brief to argue these pieces of real evidence except to state that it must have been paved by mistake. Perhaps, the Surveyor, most

likely long since dead, also made a mistake on his maps as did the city engineers' indexing clerks, and the county assessors' employees. But, in fifty years, some one should have caught the error. As political parties changed, and new employees came on the job, one perfectionist would have caught the error, if there was one.

The question of dedication is one of fact, the burden at trial was on the landowner to show license and not adverse possession (See Thompson on Real Property, Vol. 2, Section 525). If Appellants had this burden at trial, on appeal it becomes most oppressive.

CONCLUSION

In this case many people have owned the land and may have used it. Records as old as 1915 show it to be a public street. Because the present owner is of the "Dog in the Manger" variety, does not refute what prior owners did with the property as manifested by documents which have stood the test of time. Facts should best be left to the trier of facts at the trial level, and the trial judges opinion should be sustained.

Respectfully submitted,

GALAN ROSS
731 East South Temple
Salt Lake City, Utah
Attorney for Respondent

APPENDIX "A"

EXTRACT FROM BLOCK 13, PLAT "F" S.L.C.
S.L. COUNTY RECORDERS OFFICE